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SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 132

THE HANNA FURNACE CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE BALTIMORE AND OHIO RAILROAD
COMPANY, et al,
Appellees.

Appeal from the District Court of the United States
For the Western District of New York

PETITION FOR REHEARING

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I

This petition is filed by the appellant, The Hanna Furnace Corporation, for the purpose of obtaining a rehearing of an order entered granting a motion to affirm the judgment of the District Court pursuant to the provisions of Rule 7, paragraph 4.

The rule provides that a motion to affirm will be received "on the ground that it is manifest that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." The appellees have not claimed that the appeal was taken for the purpose of delay and a delay in the decision of this cause would be of no benefit

to appellant because payment of the allowance hereinafter described is being withheld by the railroads pursuant to an order of the District Court, pending the decision of this case.

We shall direct ourselves therefore, only to showing that the questions are not unsubstantial and do need further argument.

II

This cause was instituted before a three-judge District Court to set aside an order of the Interstate Commerce Commission. The same act which provides for the hearing in the District Court provides for a direct appeal as of right to this court from the decision of the District Court. The statute is the Urgent Deficiencies Appropriations Act of October 22, 1913 (Title 28, U. S. Code, Section 47).

This motion is not filed as the last struggle of the loser in a contest but is presented to the court in the sincere belief that in granting the motion to affirm, without permitting appellant to present the case on the complete record and with a full hearing, the court has done appellant a grave and a serious injustice because the questions involved in this appeal can only be determined by an examination of the record and not by reference to prior decisions. It is only such belief that leads us to trespass on the time of the court with this motion for rehearing.

The court's order forces us to the conclusion that the court has adopted the assertion set forth in the appellees' motion to affirm, that "The Commission's present report (253 I.C.C. 613) ordering the discontinuance of the allowance of appellant's plant is merely another of these supplemental reports (the 67th)," and has inferred that this

appeal is without merit because of the prior decisions affirming the Commission's orders in other cases.

The disposition of this case on a motion to affirm is directly opposed to the rule laid down by this court, that where the question is the existence of substantial evidence to support the Commission's order each case must be determined on its own facts.

> *United States v. Wabash Railroad Company, et al.*, 321 U. S. 403, 407-408.
>
> *United States v. American Sheet and Tin Plate Company, et al.*, 301 U. S. 402, 411.

We do not question the power of the court to grant the motion to affirm in this case. However, the Congress has granted to the appellant a specific right of direct appeal on the merits. Among the questions reviewable in this court is the fundamental question of whether the order of the Commission is sustained by substantial evidence without which it can have no validity. It would seem, therefore, that since the principal question involved is whether or not there is any substantial evidence to support the decision of the Commission, whose decision on the facts, if supported by substantial evidence, is conclusive, and where the lower court divided on that very question, the disposition of this case on a motion to affirm in effect denies the appellant the appeal which the statute gives it. The slightest doubt of the correctness of the decision of the lower court should induce this court to deny the motion to affirm and permit a full presentation of the case on the merits.

We have made a careful analysis of all of the decisions of this court under Rule 7, paragraph 4. In the only cases

where the court has discussed the application of the rule the court has held that a motion to affirm should only be granted,

> "* * * where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the Court as to absolutely foreclose further contention on the subject." *Equitable Life Assurance Society v. Brown*, 187 U. S. 308.

III

The appellant is not questioning the correctness of any prior decision of this court arising out of the Ex Parte 104 proceeding. Appellant recognizes that the rules for the determination of the questions involved in this appeal have been announced by this court on several occasions, and that those rules must be considered as governing the decision in this case.

The appellant contends, however, that the order of the Commission under review denies appellant the measure of transportation service to which it is entitled under the decisions of this court and the general rules pronounced by the Commission itself.

The Commission has recognized that under normal conditions the American freight rate contemplates delivery of the car at the point where it can be conveniently loaded or unloaded. The rule is well stated in the *American Sheet*

and Tin Plate Company case, 301 U. S. 402 (409), as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur tracks owned by an industry. The practice has come to be uniform that in delivering a car on a team track the carrier will spot the car at a point where merchandise of the class contained in the car is usually and most conveniently unloaded; thus there are particular team tracks or points where fruit and vegetables, furniture, etc., etc., are constantly loaded and unloaded and cars are spotted accordingly. In the analogous situation where an industry's warehouses or other facilities are located at given points on a spur or sidetrack, the carrier holds itself out to spot the car at the point where it is needed for loading or unloading, as a warehouse door, a scrap pile, etc., etc."

The Commission held generally in its main report in Ex Parte 104 (209 I.C.C. 11) that no private industry should receive any greater or more extensive service than the railroads offered to the public generally on team-tracks owned and operated by the carriers. The Commission did not attempt to determine the extent of team-track service but it found that if certain conditions did exist then the service on private sidetracks exceeded team-track service. These conditions were: (1) physical disability of the industrial plant tracks such as narrow gauge track, severe curves over which carrier power could not operate or other unsafe or hazardous conditions, (2) the refusal of the industry to accept the service if proffered by the carrier, yet at the same time maintaining that it was entitled to an allowance,

and (3) interruption or interference from plant locomotives or operations if the carrier were to perform the service. As examples of what constituted plant interruption or interference, the Commission attached to its report certain rules that had been promulgated by The Traffic Executive Association, Eastern Territory.

The Commission's main report was followed by supplemental reports which dealt with the conditions at certain specific industries, including appellant's.

The Commission has specifically approved the payment of allowances at certain industrial plants:

Pacolet Manufacturing Company, Operating Allowance, *Ex Parte* 104, 210 I.C.C. 475;

Chiloquin Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 241 I.C.C. 495;

Lamm Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 575;

Silver Falls Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 509;

Pittsburgh Steel Company, Terminal Allowance, *Ex Parte* No. 104, 241 I.C.C. 562;

Celotex Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 105;

Snoqualmie Falls Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 112;

Interlake Iron Corporation, Duluth, Minnesota, Terminal Allowance, *Ex Parte* No. 104, 245 I.C.C. 437;

J. Niels Lumber Company, Terminal Allowance, *Ex Parte* No. 104, 248 I.C.C. 283.

The Commission has specifically held that the mere fact that a carrier has never performed completed car spotting service at a given plant is not indicative of the obligation of the carrier to perform such service. *Silver Falls Timber Company,* Terminal Allowance, 245 I.C.C. 509, wherein the Commission said:

> "Manifestly the fact that respondent herein never performed the switching service to and from the loading and unloading points within the plant of the industry is not determinative of the question as to whether this is a transportation service to which the industry is entitled under the line haul rates without charge."

In its main report in Ex Parte 104, the Commission quoting with approval from the Car Spotting Charges case (34 I.C.C. 609), said:

> "The mere size or complexity of the industry is not controlling in determining whether or not the line haul rate covers the receipt or delivery of freight at the door of the plant."

Some of the supplemental reports and orders of the Commission have been reviewed by this court.

The first case was *United States v. American Sheet and Tin Plate Company, et al.,* 301 U. S. 402. In that case the court decided that under Section 1 of the Interstate Commerce Act, the Commission has the power to determine what is embraced within the service of transportation and what lies outside of that service, and the power to enjoin the performance of any additional service or the making of an allowance to the industry which performs it. The court held that the findings of the Commission were adequate, and, if supported by substantial evidence, sufficient

to sustain the orders made. The court then examined the evidence in each case and held that the findings in respect to the individual plants were supported by substantial evidence. The court pointed out that each case must be determined upon the circumstances disclosed at each industrial plant.

In *United States v. Pan American Petroleum Corporation, et al.*, 304 U. S. 156, one of the cases cited by the court in granting the motion to affirm, the court pointed out that the appellees asserted that the Commission exceeded the powers conferred upon it by the Interstate Commerce Act. These contentions were the same considered by the court in the *American Sheet and Tin Plate* case, and the court properly held that appellees as to those contentions were foreclosed by the court's prior decision.

Notwithstanding, the court then proceeded to examine the record before the Commission and found that each order had been supported by substantial evidence.

The second case cited by the court in support of granting the motion to affirm is *United States v. Wabash Railroad Company, et al.*, 321 U. S. 403. In that case the court reaffirmed the principle that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts *if supported by evidence.* The court, after quoting from the main report of the Commission in Ex Parte 104 the test the Commission therein prescribed, said (page 407):

> "The application of such a test obviously requires an intensive study of traffic conditions prevailing at

> the particular plant at which the spotting service is rendered."

The court then examined at length the evidence as to the industrial plant involved in that case and concluded that it did support the findings made by the Commission.

The Commission's order involved in this appeal directed the carriers involved to cancel the terminal allowance tariffs in effect for upwards of twenty years, paying to appellant ninety cents per car for the switching of cars at appellant's plant in Buffalo, New York, for the account of the carriers. The basis of the Commission's order was that the carriers, if they were to perform the service for which they were paying appellant the allowance, would encounter frequent interruption or interference from plant operations, and therefore the payment of the allowance amounted to a preference under Section 6 (7), Interstate Commerce Act. The appellant contends that there was no substantial evidence to support the finding of interference made by the Commission and that in the absence of substantial evidence the order of the Commission is invalid and arbitrary.

It is difficult to understand how the decisions of this court in either the *Pan American Petroleum Corporation* case or the *Wabash Railroad Company* case can be conclusive as to whether or not the evidence before the Commission supports its findings in this case. A determination of this question can only be made from an examination of the record before the Commission.

IV

A basic feature which distinguishes the cases passed upon by this court, in which the switching service involved was held to exceed that rendered for shippers generally

on industrial sidetracks or team-tracks, was the double movement required by first placing the cars on inter-change tracks and, later, at the convenience of the industry, switching them to points of loading or unloading. This was emphasized in the case of *United States v. Wabash Railroad Company*, 321 U. S. 403, where the court said that the controlling question was whether the movement from the inter-change tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team-track or siding. This double movement was present in all the cases passed upon by this court.

But, in contrast, the appellant does not require cars to be delivered on inter-change tracks and subsequently moved to points of loading and unloading. There are only seven points in appellant's plant where cars are spotted for loading or unloading. The Commission has found that every one of these points is readily accessible to the carrier's rails and can be reached by direct movement from the connecting tracks of the carriers, and that, subject to opening and closing the necessary switches, the movements are simple movements, provided there is no interference from plant operations.

The crucial question, in view of these findings of the Commission, is whether the Commission's conclusion that spotting cars by the railroads to these points over these tracks would be met by interruptions and interferences from plant operations, is supported by substantial evidence. If not, the other findings of the Commission requires an annulment of its order.

The appellant contends, and Judge Burke in the District Court held, that not only is there no evidence to support

the Commission's finding that there would be interference, but that the finding is contrary to the only evidence in the case on the subject. A determination of this contention cannot be made by reference to any other decided case as a precedent, but only from an examination of the record in this case.

V

Appellees in their motion assert that the only question before the District Court and before this court is whether or not there was any substantial evidence to support the findings of the Commission. If this is the only question involved and if, as appellees assert, the decision of the District Court "was clearly right, that the appeal presents no substantial question, and that the decision should therefore be affirmed without argument" it should not have been difficult for appellees to point out some bit of testimony or evidence which they claim supports the decision of the Commission. Yet, the appellees simply review the conclusions reached by the Commission and the comment on the evidence in the prevailing opinion of the District Court.

A great deal of the comment on the evidence in the prevailing opinion consists of statements in respect to suppositious findings which it was said the Commission might have made. The District Court has no more right to usurp the fact-finding power of the Commission to support its order than to annul it. Findings actually made by the Commission must determine the validity of its order. Many operations within the plant discussed by the District Court have no bearing on the question of interference because there is no evidence in the record as to the nature, or the time, or the extent of such operations or the locations

within the plant where they are conducted. The Commission made no findings in respect thereto and none can be made by the courts.

The appellees dismiss the only direct evidence on the question of interference, the testimony of witness Frederickson, with this statement:

> "He was speaking concerning a hypothetical mode of operation which had never been adopted at this plant. This was the language of hope rather than of experience which the Commission was entitled to weigh and to refuse to accept at face value."

It is conceded that the carriers never performed the service within appellant's plant. The question before the Commission was whether or not if the carriers were to perform the service it could be done within the principles of industrial sidetrack spotting announced by the Commission in its general report (209 I.C.C. 11) and approved by this court. Witness Frederickson was the only witness called to testify as to the requirements of the industry, the nature of its business and the extent and character of the spotting service that would be required. All of the "circumstantial evidence" referred to by the District Court and here relied upon by the appellees in their motion to affirm was elicited from witness Frederickson. The only other evidence was the blueprint. Witness Frederickson introduced this blueprint and described it in detail. He testified as to the number of tracks, the length thereof, the points where materials are loaded and unloaded, the extent of plant and line-haul switching, the number of cars handled during the test period, the hours the plant operates and the number of switch engines used by appellant. He testified that because of the plant layout and the use of particular tracks in his opinion no interference with carrier

operation would occur. He further testified that if the carriers performed the service there would be no need to use the present inter-change yard as all of the points of loading and unloading were directly accessible to the rails of the line-haul carriers, and the Commission so found in its report.

Yet the Commission rejects his evidence on interference and in its place substitutes its conclusions that interference must of necessity occur.

Appellant asserts that Judge Burke's treatment of this point was correct:

> "The only evidence on the question of possible interference with car spotting movements, if conducted by the railroads, was the testimony of Frederickson, assistant to plaintiff's general superintendent, who was competent to testify as to the requirements of the industry and he had knowledge of the way plaintiff's business was and could be conducted. He testified regarding the requirements and manner of operation of defendant's plant. He said that there would be no interference by intra-plant traffic with car spotting movements and explained that the plaintiff would not have to conduct its car movements at the same time and in the same location where the railroads would be performing car spotting service. The Commission has rejected this testimony. There is no more ground for holding that there would be interference on the basis of the Commission's expert knowledge, without evidence, than there would be for holding that the plaintiff's trestle would not support the weight of railroad switching engines on the basis of the Commission's expert knowledge, without evidence."

The only other witnesses called by the Commission in this proceeding were representatives of the carriers. Their

testimony is briefly reviewed on pages 10, 16 and 17 of appellant's brief opposing appellees' motion to affirm heretofore filed with the court. It is sufficient to reiterate that their testimony corroborated Frederickson's and did not refute it.

Appellees in their motion say:

> "For example, it appears that both kinds of cars are presently intermingled; that appellant preferred to do the line haul switching itself despite the fact that such switching cost it $1.73 per car and it received an allowance of only 90c per car from the railroads; and that this switching would be much more costly to the railroads than switching in their own yards."

As to the intermingling of cars, Frederickson testified that this was done as a matter of convenience under present operations but that if the carriers were to perform the service there would be no need to intermingle plant cars and line-haul cars. As Judge Burke said:

> "Plaintiff had a right to conduct those operations in its own way and suited best to its own convenience. It does not follow that it would have to be done in the same manner if the service were performed by the railroads."

There was no evidence that appellant preferred to do the line-haul switching itself. On the contrary, the evidence shows that it made no difference to appellant whether it received the allowance or the carriers performed the service (See page 5, appellant's brief in opposition to motion to affirm).

The evidence on the question of cost to the carriers was that it would cost them more to perform the switching

service at appellant's plant than to pay the allowance, but that the cost of spotting cars at appellant's plant would be about the same, car for car, as in their own yards. (See testimony of witness Haines, quoted on pages 15-18 of appellant's brief in opposition to motion to affirm.)

VI

If, as appellant contends, the decision of Judge Burke is right and that of the majority of the lower court wrong, a grave injustice will be done by this court in refusing to review the case merely because the court has found in each terminal allowance case heretofore reviewed that the Commission had before it substantial evidence upon which to base its findings. On the authority of the statements of this court that each case must be decided on its own record, appellant believes that it is entitled to have the record in this case reviewed, not because the appellant seeks to have the court reconsider any principle of law announced in the other cases, but because the appellant contends that the Commission has refused to apply these principles to its case and has arbitrarily, without evidence, entered its order cancelling the tariffs here involved.

Petitioner prays that the court will reconsider its order granting the motion to affirm.

Respectfully submitted,

RALPH ULSH,
Attorney for Appellant.

HARRY D. FENSKE,
JAMES McEVOY, JR.,
Of Counsel.

Dated at Buffalo, New York,

October....., 1944.

AFFIDAVIT

I, Ralph Ulsh, attorney for petitioner, The Hanna Furnace Corporation, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

RALPH ULSH.